IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 448 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NEW INDIA ISSURANCE CO.LTD

Versus

NANUBEN WD/O PARBATBHAI

Appearance:

1. First Appeal No. 448 of 1981

MR A.M. KAPADIA for MR. S.B. VAKIL for Petitioner No. 1

MR SK JHAVERI for Respondent Nos. 1-9

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 05/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.M.MEHTA)

1. New India Assurance Company-appellant-original opponent No. 3 has filed this First Appeal under Section 110 D of the Motor Vehicles Act, 1939 against the judgement and award dated 22.1.1980 passed by the Motor Accident Claims Tribunal (Main), Banaskantha district at Palanpur in Motor Accident Claim Petition No. 68 of 1979. The Tribunal by its judgement and award directed that the applicants do recover Rs. 68,551/- from the opponents together with interest at the rate of 6% per annum from the date of the application till the date of realisation, with proportionate cost of the petition. It may be noted that original applicants have filed Cross Objection under order 41 Rule 22 of the C.P.C. restricting their claim to the extent of Rs. 1,00,000/-.

2. The facts giving rise to this First Appeal are as under:

2.1 Smt. Nanuben, widow of Parbatbhai Gopalbhai and others-original applicants have filed Motor Accident Claim Petition before the Motor Accident Claims Tribunal (Main), Banaskantha District at Palanpur. In the said petition it was averred that on 26.5.1979 the deceased Parbatbhai was to bring three buffaloes and two oxen after purchasing the same from Vadali and he was to bring these cattle in the truck of Patel Parsotambhai Mavjibhai. It was averred by the petitioner that the deceased Parbatbhai started at 3.00 a.m. in truck bearing registration No. GRS 5099. At that time the deceased, the truck driver and the cleaner and another one person were in the cabin of the said truck and other three persons were in the body of the truck. It was further averred that the driver of the said truck was driving the said truck at a high speed and when they were proceeding between Varahi and Santalpur, the truck turned turtle due to rash and negligent driving by Abdulhamid Abdulhaq Pathan-opponent No. 2 who was driver in the employment of Patel Parshottambhai Mavjibhai- opponent No. 1. There upon the deceased Parbatbhai fell down from the truck and he died on the spot. Two buffaloes also expired and one buffalo was injured but has become useless and two oxen were injured but they were unable to do their job and hence the petitioners have filed petition under Section 110A of the Motor Vehicles Act, 1939 for obtaining compensation of Rs. 1,46,000/-.

2.2 It was also stated that at the time of death the deceased was aged 35 years and he was earning Rs. 6,000/- to Rs. 7000/- per year and he was also earning Rs.

3,000/- to Rs. 4,000/- out of the milk and dairy business. That is how the claimants claimed Rs. 1,10,000/- towards compensation to the deceased, about Rs. 16,000/- towards damages of buffaloes and oxen, Rs. 10,000/- for pain, shock and suffering and Rs. 10,000/after death ceremony in all Rs. 1,46,000/-.

2.3 Opponent Nos. 1 and 2 i.e. the owner and the driver filed their written statements vide exh. 35. They denied that the accident has occurred due to rash and negligent driving of opponent No. 2. It was not admitted that the deceased was earning Rs. 6000/- to Rs. 7,000/- per year from agriculture and Rs. 3,000/- to Rs. 4,000/- from dairy business. It was also not admitted that the deceased died in the accident and one buffalo died in the accident and another buffalo was injured and died afterwards and that two oxen were also injured and have become useless for the agricultural work. It was also denied that the deceased hired the truck from opponent No. 1 and started for reaching village Kotda in the said truck with his animals. It was stated that actually the cattle belonged to one Lavjibhai Ayer of village Dhaneta, Taluka Anjar. The deceased had come with him and as one man was required to lookafter the cattle and as their employees were not present, the deceased Parbatbhai was engaged as a labourer and it was agreed that he be paid Rs. 25/- and on the way the present accident happened. It was submitted that as the repairing work was being carried out on the road and as the stones were thrown scattered on the road, the truck dashed with one stone and the driver of the truck lost control over the vehicle and accident occurred. Therefore, the petitioners are not entitled to any compensation and the petition of the petitioners is liable to be dismissed.

2.4 The New India Assurance Company-opponent No. 3 appellant herein - also filed written statement at Exh. 19 and denied the contention of the petitioners. It was not admitted that two buffaloes have died and two bullocks and one buffalo were injured due to the accident and that they were unable to work. It is also denied that the deceased was earning Rs. 6000/- to Rs. 7000/per year from agriculture and Rs. 3000/- to Rs. 4000/- from the dairy every year. It was not admitted that the truck was driven rashly and negligently by opponent No. 2 driver. It was stated that Insurance Company is not liable to pay damages. It was submitted that there was no statutory contract to allow the deceased to travel because of the animals of him were loaded in the truck. The policy was not required to

cover and in fact did not cover the risk of passengers for hire or reward. The carrier permit prohibits the passengers being conveyed in a goods vehicle and as the deceased was conveyed in the goods vehicle in breach of the permit, the Insurance Company is not liable to compensate the applicants. It was alternatively submitted that the applicants are not entitled to get more compensation than required to be covered under the policy of a passenger in a public vehicle and hence the petition is liable to be dismissed.

2.5 The Tribunal after appreciating the evidence on record came to the conclusion that the applicants are entitled to Rs. 57,500/- for the death of the deceased Parbatbhai including the amount of expectation of life and loss to the estate. The Tribunal has also awarded Rs.. 10,051/- due to loss and injury of the cattle and Rs. 1,000/- as expenses incurred towards after death ceremony. In all the Tribunal has awarded a sum of Rs. 68,551/- with interest at the rate of 6% (six percent) from the date of application till the date of realisation with proportionate cost in favour of the applicants and against the opponents.

2.6 Mr. A.M. Kapadia, learned advocate for Mr. S.B. Vakil, appears on behalf of the Insurance Company. He has invited our attention to the original claim petition filed by the claimants in which it was stated that the deceased had purchased animal from Patel Parshottambhai Mavjibhai and thereafter he was travelling in the truck as a passenger with his own animals. At that time the deceased died, some of the animals were also died and some of the animals were injured. He therefore submitted that in view of this averment made by the applicants, the deceased was a gratuitous passenger in the goods vehicle. He also invited our attention to the policy to substantiate his say that the vehicle being goods vehicle and the deceased being gratuitous passenger is not entitled to any compensation. He has also invited our attention to the fact that in this case the truck in question was a goods vehicle as defined under the Motor Vehicles Act, 1939 and the deceased was travelling in the truck as gratuitous passenger along with his cattle. There was no contract between the owner of the truck and the deceased in this behalf as the animals belonged to the deceased. The learned counsel for the Insurance Company has seriously assailed the finding of the Tribunal that due to absence of labourer the deceased was engaged as labourer and agreed that he be paid Rs. 25/- and on the way the accident occurred.

2.7 The learned counsel for the appellant has also

invited our attention to the judgement of the Hon'ble Supreme Court in the case of SMT. MALLAWWA VS. ORIENTAL INSURANCE CO. LTD. reported in AIR 1999 SC 589. He has relied on para 10 of the said judgement (at pages 593-594) which reads thus:

> "For the purposes of Section 95, ordinarily a vehicle could have been regarded as a vehicle in which passengers have carried if the vehicle was of that class. Keeping in mind the classification of vehicles, by the Act, the requirement of registration with particulars including the class to which it belonged, requirement of obtaining a permit for using the vehicle for different purposes and compulsory coverage of insurance risk, it would not be proper to consider a goods vehicle as a passenger vehicle on the basis of a single use or use on some stray occasions of that vehicle for carrying passengers for hire or reward. For the purpose of construing a provision like proviso (ii) to Section 95(1)(b), the correct test to determine whether a passenger was carried for hire or reward would be whether there has been systematic carrying of passengers. Only if the vehicle is so used then that vehicle can be said to be a vehicle in which passengers are carried for hire or reward."

3. Mr. Zaveri, learned counsel for the original claimants has supported the reasoning and finding of the Tribunal in this behalf. However, he has stated that due to the evidence on record the applicants are entitled to higher amount of compensation. For this purpose he has relied on the Cross Objection filed in this behalf.

3.1 It is true that in view of the judgement of the Hon'ble Supreme Court in the case of SMT. MALLAWWA (supra) if the vehicle is goods vehicle and the passenger is a gratuitous passenger, the Insurance Company is not liable.

3.2 However, we will have to consider the facts of this case. First we are referring to the reply filed by opponent Nos. 1 and 2. In the written statement it is stated that originally cattle were belonged to one Lavjibhai Ayer of village Dhaneta, taluka Anjar. The opponents desired to travel with the animals and at that time their own employees were not present, opponents decided to engage deceased Parbatbhai as labourer and it was agreed that he be paid Rs. 25/- for looking after the animals on the way and accordingly he was paid the

aid amount. It may be stated that the say of the opponents is also consistent with the say of Naranbhai Exh. 43. He has also stated in his deposition that Parbatbhai was pad Rs. 25/- to look after the animals who was also present at the time when the labourer was engaged. In view of factual aspect in our view it is established that the deceased Parbatbhai was engaged only to lookafter the animals and he was accordingly paid Rs. 25/- by the owner of the truck and to that extent he was clearly in employment of the owner of the truck. The deceased did not travel in the truck with his own cattle and he travelled in the truck only to lookafter the cattle of Lavjibhai Ayer. Though it has been contended by the learned counsel for the appellant that the deceased purchased the animal and he was travelling with his own cattle, we have considered the evidence of Naranbhai and also evidence of Amarsingh at Exhs. 43 and 50 respectively. However, the dates mentioned by them of purchase of the cattle by the deceased is not consistent with the date of accident. We, therefore, did not believe the say that the deceased was travelling with his own cattle. The appellant has not produced any evidence in support of the contention that the deceased was travelling with his own cattle.

3.3 In view of the aforesaid finding of the fact which we have arrived at and the contention of the learned counsel for the appellant on the basis of the policy, the judgement of the Hon'ble Supreme Court in the case of MALLAWWA (supra) relied on by the learned counsel for the appellant will not be applicable to the present case.

3.4 In view of the same, we are of the view that appellant-opponent No. 3 is liable to pay compensation to the applicants.

3.5 Regarding compensation - As regards compensation, the applicants have produced evidence of Nanuben, widow of Parbatbhai Gopalbhai, at Exh. 42. She has stated that the deceased was carrying agricultural operation and he had income from agriculture of Rs. 10,000/- to Rs. 12,000/-. he was also carrying on business of selling milk and he was earning Rs. 4,000/- to Rs. 5,000/-. The applicant has also produced evidence of Naranbhai at Exh. 43 who was also carrying on agricultural operation of the deceased on the total agricultural land of 30 acres. The applicants have also produced evidence of Devjibhai Gopalbhai at exh. 49. He has also supported that deceased was carrying on purchase and selling of milk in this behalf. He stated that deceased was

carrying on agricultural operation. The evidence of Kantilal Ambalal Dave is at Exh. 55. He was a clerk in Ginning factory. He has stated that the deceased was selling cotton to the Ginning factory worth Rs. 21,795/in the year 1977-78, Rs. 20,281/- in the year 1978-79. He has produced accounts in support of his say for the year 1977-78 and 1978-79 and for other years he has also produced books of accounts.

3.6 The tribunal after appreciating evidence on record has fixed total figure of Rs. 6000/- as income of the deceased Parbatbhai from agriculture as well as income from dairy business. He accordingly deducted 1/3rd of the income so as to calculate the remainder figure for the dependency benefit. This in our opinion appears to be just and reasonable. However, amount of Rs. 2500/- deducted by the Tribunal per year as personal expenses of the deceased is on the higher side. In our opinion the said figure could have been Rs. 2000/- and rest of the amount i.e. Rs. 4000/- being the amount of dependency per year and if that figure is multiplied by 15, then the amount under the head dependency benefit would come to Rs. 60,000/-. An amount of Rs. 10,000/is added on account of loss of expectation of life and loss of estate instead of Rs. 5,000/- as awarded by the Tribunal and Rs. 1000/- is awarded towards expenses incurred for after death ceremony. In all, Rs. 71,000/- is awarded.

3.7 In view of the specific finding recorded by us, namely, that the deceased did not travel in the truck with cattle and in view of the sufficiency of evidence, he is not entitled to Rs. 10,051/- as loss suffered by the applicants due to loss and injury of the cattle of the applicants. Thus in our opinion claim of Rs. 10,051/- on the said head awarded by the Tribunal is not allowed. To that extent, the appeal preferred by the appellant Insurance Company is allowed.

3.8 In the result the appeal is partly allowed. The appellant and opponent Nos. 8 and 9 shall jointly and severally pay Rs. 71,000/- being the amount of compensation with 6% interest from the date of the application to the realisation to the applicants-opponent Nos. 1 to 7.

3.9 It is clarified that the opponents shall deposit the additional amount awarded by this court together with interest before the Tribunal within a period of ten weeks from the date of receipt of the order of this court. On such amount being deposited the Tribunal shall disburse

the same to the claimants after proper verification and shall also disburse the amount already deposited in pursuance of the direction contained in the judgement awarded dated 22.1.1980.

4. In the result, the appeal as well as the Cross Objection are partly allowed to the aforesaid extent with no order as to costs.

(K.R. VYAS, J)

(K.M. MEHTA,J)

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